

DRAFT AS OF 3-26-15

**CERCLA Financial Assurance Sample Trust Fund for Use in Connection with
Unilateral Administrative Orders**

NOTE: A trust fund, as specified in the relevant unilateral administrative order, may be worded as follows, except that instructions in brackets should be replaced with the relevant information and the brackets deleted. If order recipients (Respondents) seek to establish financial assurance by using a surety bond, letter of credit, or corporate guarantee, such Respondents should be required to establish and maintain a “standby” trust fund, into which funds from the other financial assurance mechanism can be deposited if the financial assurance provider is directed to do so by EPA pursuant to the order. Therefore, EPA recommends that a standby trust agreement contain language similar to the below language, except that an originally signed duplicate of the standby trust agreement should be submitted to EPA with the other financial assurance mechanism, and the standby trust fund should be fully funded upon the disbursement of the surety bond or letter of credit or upon the payment stemming from the corporate guarantee. Case teams should modify the trust agreement as appropriate if multiple Respondents establish the trust.

[Insert if applicable: STANDBY] TRUST AGREEMENT

[Insert site name [operable unit]]

Dated: [Insert date]

This Trust Agreement (the “Agreement”) relating to **[insert trustee-provided trust account number]** is entered into as of **[insert date]** between **[insert name of PRP/Respondent]**, a **[insert name of state]** **[insert as appropriate: “corporation,” “limited liability company,” “partnership,” etc.]** (the “Grantor”), and **[insert name of trustee]**, **[insert as appropriate: “incorporated in the state of [insert name of state]” or “a national bank”]** (the “Trustee”). The United States Environmental Protection Agency (EPA), an agency of the United States Government, is not a signatory herein, but will act hereunder in accordance with the Order (defined below).

RECITALS

Whereas, EPA has issued a unilateral administrative order (“Order”), dated **[insert date]**, **[insert docket number]**, to the Grantor under the authority vested in the President of the United States by Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9606(a), requiring the Grantor, among other things, to provide assurance that funds will be available when needed for performance of the **[insert activities required by the Order: e.g., removal action, remedial design/remedial action, remedial investigation/feasibility study, etc.]** (the “Work”) at the Site (defined below);

Whereas, the Grantor is establishing a trust to provide all or part of such financial assurance for Work at the Site;

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this Agreement, and the Trustee is willing to act as trustee;

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

- (a) “Agreement” has the meaning provided in the first paragraph of this Agreement.
- (b) “Beneficiary” means the Grantor or any person or entity seeking payment from the Trust under and consistent with Section 4 to finance the Work.
- (c) “CERCLA” has the meaning provided in the Recitals.
- (d) “EPA” has the meaning provided in the first paragraph of this Agreement.
- (e) “Grantor” has the meaning provided in the first paragraph of this Agreement, along with any successors or assigns of the Grantor.
- (f) “Order” has the meaning provided in the Recitals.
- (g) “Site” has the meaning provided in Section 2.
- (h) “Trust” has the meaning provided in Section 3.
- (i) “Trust Assets” has the meaning provided in Section 3.
- (j) “Trustee” has the meaning provided in the first paragraph of this Agreement, along with any successor Trustee appointed pursuant to Section 11.
- (k) “Work” has the meaning assigned thereto in the Order.

Capitalized terms not otherwise defined herein shall have the meanings provided for in CERCLA and/or the National Contingency Plan, 40 C.F.R. Part 300.

Section 2. Identification of Site and Cost Estimate. This Agreement pertains to costs for Work required at the [insert site name [operable unit]] in [insert name of city, county, and/or state] (the “Site”) pursuant to the Order.

Section 3. Establishment of Trust. The Grantor and the Trustee hereby establish a trust fund (the “Trust”). The Grantor and the Trustee acknowledge that the purpose of the Trust is to fulfill the Grantor’s Work obligations under the Order. All expenditures from the Trust shall be to fulfill the legal obligations of the Grantor under the Order, and not any obligation of EPA. An independent third party will not have access to the Trust Assets (defined below) except as herein provided. The Trust is established initially as consisting of cash and/or cash equivalents in the amount of \$[insert either initial funding amount for funded trusts or “0” for standby trusts], which is acceptable to

the Trustee and described in Schedule A attached hereto. Such funds, along with any other cash and/or cash equivalents subsequently transferred to the Trustee, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement, are referred to herein collectively as the "Trust Assets." The Trust Assets shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor under the Order.

Section 4. Payment for Work Required Under the Order. The Trustee shall make payments from the Trust to finance the Work under EPA's oversight in accordance with the following procedures:

(a) From time to time, the Grantor and/or its representatives or contractors, or contractors selected by the Trustee, may request that the Trustee make payment from the Trust for Work performed or to be performed under the Order by delivering to the Trustee a written request for payment signed by an officer of the requesting entity. A copy of the payment request shall also be sent to EPA. Any payment request should be in a form substantially identical to the sample provided in Exhibit A and, at a minimum, should:

(i) Include a certification that the request is submitted for Work performed or to be performed at the Site in accordance with the Order;

(ii) Describe the Work that has been performed or will be performed;

(iii) Specify the amount of funds requested from the Trust; and

(iv) Identify the payee(s) of the funds requested.

(b) As part of EPA's oversight role regarding the implementation of Work, EPA may object, in whole or in part, to any payment request under subparagraph (a) only on the grounds that the requested payment is either not for the costs of Work under the Order or otherwise inconsistent with the terms and conditions of the Order. If EPA objects to any payment request, EPA shall advise the Trustee and requesting entity in writing, by stating whether EPA objects to all or only part of the payment requested and the basis for the objection.

(c) If the Trustee receives a payment request under subparagraph (a) and EPA advises the Trustee in writing that payment from the Trust is necessary to fulfill the obligations of the Grantor under the Order, the Trustee shall promptly make the requested payment from the Trust.

(d) If EPA objects to any payment request under subparagraph (b), the Trustee shall promptly make payments from the Trust for the portion of the requested payment, if any, that is not subject to an objection by EPA. The Trustee shall not make

any payment from the Trust for any portion of the requested payment that is subject to an EPA objection.

(e) If, at any time during the term of this Agreement, EPA takes over the performance of all or any portion(s) of the Work under the terms of the Order, EPA shall notify the Trustee in writing of EPA's commencement of Work. Upon receiving such written notice from EPA, the disbursement procedures set forth in Sections 4(a)-(d) above shall immediately be suspended for costs of Work taken over by EPA. Notwithstanding the issuance of such written notice from EPA, the Trustee may make payments from the Trust in accordance with the disbursement procedures set forth in Section 4(a)-(d) above for costs of Work performed or to be performed under the Order not taken over by EPA. Such payments cannot be for work taken over by EPA and its contractors. If EPA ceases Work it had taken over, EPA shall so notify the Trustee in writing and, upon the Trustee's receipt of such notice, the disbursement procedures specified in Sections 4(a)-(d) above shall be reinstated.

(f) The Grantor may request the Trustee to return to the Grantor any funds that remain after all of the Work has been completed. A copy of the request shall also be sent to EPA. If EPA advises the Trustee in writing that Trust Assets are no longer necessary to fulfill the Grantor's obligations under the Order, the Trustee shall promptly return any remaining Trust Assets to the Grantor.

(g) This Section does not limit or alter the United States' authority under CERCLA Section 107, 42 U.S.C. § 9607.

Section 5. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Trust and keep the Trust invested as a single fund, without distinction between principal and income, in accordance with directions which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Trust Assets, the Trustee shall discharge its duties with respect to the Trust solely in a fiduciary capacity consistent with the purpose of this Agreement and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(a) Securities or other obligations of any person or entity shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;

(b) The Trustee is authorized to invest the Trust Assets in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and

(c) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 6. Express Powers of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (b) To receive, manage, invest, supervise, and protect the Trust Assets, and to withdraw, make distributions, and pay taxes, if applicable or required, and other obligations owed by the Trust;
- (c) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale;
- (d) To retain and pay employees and professionals as the Trustee may deem necessary or appropriate to assist the Trustee with respect to the responsibilities described herein, including the performance of Work under the Order; provided, however, that EPA may (using objective criteria) review and approve of the qualifications for environmental contractors and/or consultants the Trustee proposes to perform the Work; provided further, that EPA cannot select, recommend, or propose any firms or individuals for hire/employment by the Trustee;
- (e) To prepare work plans and budgets of projected expenditures from the Trust for EPA's review in order to ensure compliance with the Order under the oversight of EPA; and
- (f) To use its best efforts to comply with any requirements set forth in the Order relating to access and institutional controls that are needed to implement the Work.

Section 7. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Trust shall be paid from the Trust. All other expenses and charges incurred by the Trustee in connection with the administration of the Trust shall be paid by the Grantor.

Section 8. Annual Valuation. Until the Trust is funded, annual valuations are not required. Once the Trust is funded, the Trustee shall annually, no more than 30 days after the anniversary date of establishment of the Trust, furnish to the Grantor and to EPA a statement confirming the value of the Trust. The annual valuation shall include an accounting of any fees or expenses levied against the Trust. The Trustee shall also provide such information concerning the Trust as EPA may request from time to time.

Section 9. Advice of Counsel. The Trustee may from time to time consult with counsel with respect to questions relating to the construction of this Agreement or any action to be taken hereunder, except for questions relating to EPA's determinations under Section 4 or EPA's authorities under the Order. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 10. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor [insert if applicable: ; provided, however, the parties acknowledge that, before the Trust is funded, the Trustee shall have minimal duties and shall be entitled to appropriate minimum compensation, if any].

Section 11. Trustee and Successor Trustee. The Trustee and any replacement Trustee must not be affiliated with the Grantor. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepted such appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the cash and/or cash equivalents then constituting the Trust Assets. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the Trust in a writing sent to the Grantor, EPA, and the present Trustee by certified mail 10 days before the change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 7.

Section 12. Instructions to the Trustee. All orders, requests, and instructions to the Trustee shall be in writing, signed by such persons as are empowered to act on behalf of the entity sending such orders, requests, and instructions to the Trustee, including those designated in the attached Exhibit B or such other designees as the Grantor may designate by amendment to Exhibit B. The Trustee shall be fully protected in acting without inquiry in accordance with such orders, requests, and instructions. All orders, requests, and instructions by EPA to the Trustee shall be in writing, signed by an authorized EPA official as designated in Section 18(c) or his or her designee, and the Trustee may rely on these instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions, except as provided for herein. In the event of conflict between the Grantor's instructions and EPA's instructions, EPA's instructions shall control.

Section 13. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, with the concurrence of EPA, or by the Trustee and EPA if the Grantor ceases to exist; provided, however, that this Agreement may not be amended to name EPA as a Beneficiary of the Trust or to direct funds to EPA or an EPA contractor.

Section 14. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 13, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor and the Trustee, with

the concurrence of EPA, or by the Trustee and EPA if the Grantor ceases to exist. Upon termination of the Trust, all remaining Trust property, less final Trust administration expenses, shall be delivered to the Grantor.

Section 15. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or EPA so long as such directions are not inconsistent with this Agreement and/or the Order. The Trustee shall be indemnified and saved harmless by the Grantor from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct made by the Trustee in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense. EPA does not indemnify either the Grantor or the Trustee due to the restrictions imposed by the Anti-Deficiency Act, 31 U.S.C. 1341.

Section 16. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of **[insert name of state in which the Site is located]** with regard to claims by the Grantor, Trustee, or any party other than EPA. Claims involving EPA are subject to federal law.

Section 17. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement. In the event of a conflict in the wording of this Agreement and the Order, the wording of the Order shall prevail.

Section 18. Notices. All notices and other communications given under this Agreement shall be in writing, identify the Site, provide a contact person (and contact information), and be addressed to the parties as follows or to such other address as the parties shall by written notice designate:

(a) If to the Grantor, to **[insert name(s), title(s), address(es), and contact information (phone number(s), email address(es), etc.)]**.

(b) If to the Trustee, to **[insert name(s), title(s), address(es), and contact information (phone number(s), email address(es), etc.)]**.

(c) If to EPA, to **[insert name(s), title(s), address(es), and contact information (phone number(s), email address(es), etc.) of appropriate EPA official/staff (e.g., Superfund Division Director, Remedial Project Manager, and/or Office of Regional Counsel contact)]**.

Section 19. Other. The Grantor shall provide a copy of the Order to the Trustee, and the Grantor shall submit an originally-signed duplicate of the executed Agreement to EPA.

[SIGNATURES ON FOLLOWING PAGE]

In Witness Whereof, the parties hereto have caused this Agreement to be executed by their respective officers duly authorized and attested as of the date first above written:

FOR THE GRANTOR:

Date: _____ By [signature]: _____
Printed name: _____
Title: _____

State of **[insert state]**
County of **[insert county]**

On this **[insert date]**, before me personally came **[insert name of PRP/Respondent's signatory]**, to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of PRP/Respondent]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

FOR THE TRUSTEE:

Date: _____ By [signature]: _____
Printed name: _____
Title: _____

State of _____
County of _____

On this **[insert date]**, before me personally came **[insert name of Trustee's signatory]**, to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of Trustee]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

Schedule A
Initial Trust Funding

DATE	FUNDING VALUE FOR WORK
[Insert relevant initial date (e.g., within 30 days of the Effective Date of the Order)]	[Insert initial funding amount for funded trusts or “0” for standby trusts]

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Exhibit A
Sample Payment Request

[Insert date]

[Insert Trustee's name pursuant to trust agreement's preamble]

[Insert Trustee's address pursuant to Section [18(b)] of trust agreement]

Re: Request for payment from the [insert if applicable: Standby] Trust [insert trust account number or other identifying information] established as financial assurance for the [insert site name] Site

Dear [insert name of Trustee]:

Pursuant to Section [4(a)] of the subject trust, the Grantor (as defined therein) and/or its representatives or contractors, or contractors selected by the Trustee (as defined therein), are authorized to request that the Trustee make payment from the trust for Work (as defined therein) performed or to be performed under the Order (as defined therein) by delivering to the Trustee (with a copy to EPA (as defined therein)) a written request for payment signed by an officer of the requesting entity. By this letter, [insert requesting entity] requests payment from the trust. The bases for the payment request are more fully described below.

1. Certification: [insert certification from officer of requesting entity that the request is submitted for Work performed or to be performed in accordance with the Order].
2. Description of Applicable Work: [insert description of the Work that has been or will be performed].
3. Amount of Payment Request: [insert amount of funds requested from Trust].
4. Proposed Payee: [insert identification of payee(s) of the funds requested].

Please let me know if you have any questions. I can be reached at [insert telephone number and email address].

Sincerely,

[insert name of officer of the requesting entity]
[insert address of the requesting entity]

cc: [Insert name and address of authorized EPA official pursuant to Sections [12 & 18(c)] of trust agreement]
[Insert other EPA staff to receive payment requests pursuant to Section [18(c)] of trust agreement]

Exhibit B
**Grantor-Designated Individuals Authorized for Orders, Requests, and
Instructions**

**[Grantor to insert person(s) (and relevant contact information) designated to
provide/make orders, requests, and instructions to the Trustee pursuant to Section
12 of trust agreement]**

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